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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

IN RE: HIGH-TECH EMPLOYEE ANTITRUST LITIGATION

THIS DOCUMENT RELATES TO:

ALL ACTIONS

Master Docket No. 11-CV-2509-LHK

DEFENDANTS' ADMINISTRATIVE MOTION PURSUANT TO CIVIL L.R. 7-11 FOR LEAVE TO FILE SUPPLEMENTAL BRIEF IN CONNECTION WITH PLAINTIFFS' MOTION FOR APPLICATION OF THE PER SE STANDARD

Judge: Hon. Lucy H. Koh

Defendants Google Inc. ("Google"), Apple Inc. ("Apple"), Adobe Systems Inc. ("Adobe") and Intel Corporation ("Intel") seek leave pursuant to Local Rule 7-11 to file a supplemental brief in connection with plaintiffs' motion for application of the *per se* standard. Defendants make this request principally because plaintiffs' reply brief (ECF No. 988) places heavy reliance on this Court's August 8, 2014 Order Denying Plaintiffs' Motion for Preliminary Approval of Settlements with Adobe, Apple, Google and Intel (ECF. No. 974) (hereinafter "Settlement Order"). Indeed, plaintiffs contend that because this Court supposedly "has now found" in the Settlement Order that there is no evidence linking the alleged do-not-cold-call agreements between the defendants to any collaborative activity, the Court may and should "condemn" all of those alleged agreements as *per se* illegal in advance of trial. Reply at 10:1-15 (ECF No. 988).

The initial briefing on this motion occurred in April 2014. As a consequence, defendants have not had the opportunity to address the Settlement Order in connection with this motion. Fundamental fairness requires that defendants have that opportunity, especially since plaintiffs' reliance upon the Settlement Order is in direct conflict with controlling Ninth Circuit authority, as set out in the attached supplemental brief. Supp. Br. at 1-3, citing *Officers for Justice v. Civil Service Commission of San Francisco*, 688 F.2d 615, 625 (9th Cir. 1982). In addition, and as set forth in the supplemental brief, defendants *do* have substantial documentary evidence and testimony that they will introduce at trial to establish that the challenged bilateral agreements were in furtherance of, and facilitated, collaborative relationships between various defendants. Supp. Br. at 3-8 and n.5. This evidence is highly relevant not just to the procompetitive nature of the bilateral agreements, but to such issues as whether the individual agreements that plaintiffs claim were part of an overarching conspiracy were, in fact, in each defendant's individual self-interest. *See In re Citric Acid Antitrust Litig.*, 191 F.3d 1090, 1100 (9th Cir. 1999) (holding that conduct that could be "interpreted as a decision in [defendant's] own independent self-interest" did not support inference of conspiracy).

Defendants also seek leave to address in the supplemental brief plaintiffs' effort in their reply brief to transform the pre-trial briefing on the *per se* standard into a motion for summary adjudication of claims and defenses, in violation of Federal Rule of Civil Procedure 56 and this Court's scheduling orders. At the March 27, 2014 case management conference, the Court stated that "I would think that the burden on this [issue of the proper standard] would be on the plaintiff, isn't it," and thus awarded plaintiffs an opening and reply brief (and ten more total pages than defendants). Mar. 27, 2014 Hrg. Tr. at 21:23-22:3. Plaintiffs' counsel did not disagree with the Court's position. Indeed, the Court correctly placed the burden on plaintiffs, as defendants explained in their opening brief. (ECF No. 887 at 4:16-5:11, *citing, inter alia, California ex rel. Harris v. Safeway, Inc.*, 651 F.3d 1118, 1133 (9th Cir. 2011) (*en banc*).

However, instead of acknowledging their burden and showing how they have supposedly met it, plaintiffs assert in their reply brief that it was *defendants*' burden to come forward, prior to trial and in the absence of a timely Rule 56 motion, with evidence that establishes the connection between defendants' joint activities and their bilateral "do-not-cold-call" agreements. Reply at 10:1-12. As set out in the attached supplemental brief, plaintiffs cannot treat this motion as a Rule 56 motion because the deadline for such motions has passed, and motions *in limine* cannot "serve as a substitute for summary judgment motions." *Butler v. Homeservices Lending LLC*, 2013 WL 6196545 at *2 (S.D. Cal. Nov. 27, 2013). Moreover, as noted above and as set forth in the supplemental brief, there is evidence in the record, and there will be additional evidence at trial, that will establish that the alleged do-not-cold-call agreements facilitated collaborative activities and "contribute[d] to the[ir] success" and were therefore pro-competitive. *Princo Corp. v. Int'l Trade Comm'n*, 616 F.3d 1318, 1336 (Fed. Cir. 2010) (*en banc*).

For these reasons, defendants respectfully request leave to file the attached Supplemental Brief in Connection with Plaintiffs' Motion for Application of the Per Se Standard.

DATED: September 18, 2014

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ATTESTATION: The filer attests that concurrence in the filing of this document has been obtained from all signatories.